In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 49.

LOCAL 24 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, and KENNETH BURKE, President and Business Agent of Local 24,

Petitioners,

vs.

REVEL OLIVER and A. C. E. TRANSPORTATION COMPANY, INC., and INTERSTATE TRUCK SERVICE, INC.,

Respondents.

On Writ of Certiorari
To the Supreme Court of Ohio and the Court of Appeals of the State of Ohio, Ninth Judicial District.

BRIEF FOR RESPONDENT REVEL OLIVER.

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NINTH JUDICIAL DISTRICT.

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STATEMENT OF OLIVER'S CASE.

Revel Oliver filed his petition in the Common Pleas Court of Summit County, Ohio, against A. C. E. Transportation Co., Inc., and Interstate Truck Service, Inc., as Lessees of his equipment and Defendants Local #24 and Kenneth Burke, President and Business Agent of the Union.

The Common Pleas Court entered an order adverse to the defendants and the Union and its business agent

appealed to the Ninth Judicial District Court of Appeals where the cause was heard de novo. The Court of Appeals made a finding and order as made by the trial court. The finding of the Common Pleas Court sets forth the facts in detail and we therefore quote his finding, which is as follows:

"This action was instituted as a class suit by the Plaintiff, Revel Oliver, and 'all other owners of motor freight equipment similarly situated, as the Plaintiff,' against numerous local unions, affiliated with 'The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers,' Kenneth Burke, the President and Business Agent for Local No. 24, and many common carriers, as the Defendants. The Plaintiff has since dismissed from the action all other owners of motor freight equipment situated as the Plaintiff and all Defendants except Local No. 24 (an affiliate of said Union), Kenneth Burke, the A. C. E. Transportation Company, Inc., and Interstate Truck Service, Inc. In the first cause of action, the Plaintiff seeks an order enjoining the Defendants from carrying out the terms of a certain contract and for equitable relief. The second cause of action, in which damages are sought from the Defendants now stands withdrawn.

"The Plaintiff is now and has been at all times in question the owner of ten units of motor freight equipment consisting of four tractors and six trailers each of which is under a lease agreement with one or the other of the said Defendant companies. The Defendant companies are engaged in the business of transporting freight both within and outside of Ohio. It is admitted by the parties that the Plaintiff and the Defendant carriers, the lessees of the equipment, are engaged in interstate commerce. (Hereafter the names of the Defendant lessees will be abbreviated for brevity.)

"The importance of this action suggests that the provisions of the leases and Article 32 of the contract under attack should be fully set forth.

"The provisions of the leases with the Defendant A. C. E. are:

'MOTOR FREIGHT TRANSPORTATION AGREEMENT

'THIS AGREEMENT, by and between A. C. E. TRANSPORTATION CO., INC., a corporation of Akron, Ohio, hereinafter designated the CARRIER, and _____ hereinafter designated as the OPERATOR,

'WITNESSETH:

'WHEREAS, Carrier is a common carrier of property by motor vehicle operating in interstate commerce and certificated by the Interstate Commerce Commission and state utility commissions to perform such service, and

'WHEREAS, Operator is the owner of the motor vehicle equipment herein described, and enters into this agreement for the purpose of furnishing transportation service to Carrier under the terms and conditions set forth herein, it being understood and agreed by the parties hereto, that if this agreement is not executed by the Operator personally, that the undersigned, in executing the same, is acting as an agent of the Operator and represents that he has full power of attorney and is authorized by the Operator to act in his place and stead and to do and perform each and every act and thing which this Agreement requires Operator to do.

'NOW, THEREFORE, in consideration of the mutual promises and agreements by the parties hereto, Operator agrees as follows:

'To provide the Carrier with the transportation service between the points and over the routes designated by carrier as will be more specifically set forth by waybills for each individual shipment, and a manifest or load sheet which will be given Opera-

tor for each trip to be made by means of the motor vehicle equipment herein set forth.

'That the equipment described herein is and at all times during the continuance of this agreement, will be maintained in the first class repair at the expense of Operator and that he will pay all costs in connection with the operation of said equipment; that he will furnish license plates and registration certificates required for said motor vehicle equipment by the state of his residence.

'That said equipment will be operated at his expense by himself or by competent employees of his in a careful manner.

'That he will pick up, transport, and deliver punctually freight received by him while in the transportation service of Carrier.

'To secure delivery receipts, properly signed, and dated, covering all freight transported hereunder by Operator and to handle such transportation business in such a manner as to promote the good will and good reputation of Carrier.

'To, at all times, display certificate numbers of the Carrier while operating over the routes and in the service of the Carrier, and at no other time whatsoever, so that when the motor vehicle equipment described herein is not used in the service of Carrier, all certificate numbers, names or other means of identification showing the same was operated in the service of the Carrier will be removed therefrom.

'That the equipment will be operated only over the certified routes of Carrier.

'To comply at all times, with all laws, rules, and/or regulations of the Interstate Commerce Commission, Bureau of Motor Carriers, or any public utilities commission of any state or other authority of any state in or through which the motor vehicles herein described may be operated under this Agreement and which may be binding or obligatory on either party hereto.

'To report to the Carrier any and all accidents involving equipment herein, or loss or damage to the freight or cargo therein to such individuals as Carrier may designate.

'To provide Workmen's Compensation coverage for his drivers and employees and to be responsible for the payment of all premiums due under any Workmen's Compensation law and to pay all state and federal taxes for unemployment compensation insurance, old age pensions, and other social security, and to meet all requirements or regulations now or hereafter adopted or promulgated by any legal constituted authority with respect to all persons engaged by him in the performance of this Agreement and, further, agrees to indemnify and keep indemnified Carrier against all liability by reason of his failure to do so.

'To sign all load or manifest sheets or have his drivers or employees do so for each load transported hereunder and to collect freight, C. Q. D., and any other charges on specific shipments when directed by written instructions on freight bills, manifests, load sheets, or otherwise, to do so.

'The carrier will provide full coverage insurance such as property damage, public liability and cargo, except on cargo when such loss occurs by reasons of fire, theft, wet freight, collision, or upset occurring when equipment is in transit, then, in that event, the maximum liability of the operator shall be Two Hundred Fifty Dollars ($250.00).

'The relationship herein created is that of independent contractor and not that of employer and employee. Operator is a contractor only and not the employee of Carrier.

'It is mutually understood and agreed that Carrier shall not be obligated to pay any fines or settlements that may be assessed against Operator or against his employees by reason of any violation of any law or regulation by him or them.

'The carrier shall not be liable to Operator for any damage sustained by or to the equipment of Operator, while the equipment is engaged in said transportation service or for loss by confiscation or seizure of the equipment by any public authority.

'In such cases where operator tractor pulls a trailer belonging to carrier or the carrier tractor pulls a trailer belonging to an operator, or an operator tractor pulls a trailer belonging to another operator, the owner of the tractor shall be liable for all losses sustained resulting from damage to the said trailer while being so used, limited, however, to the sum of Two Hundred and Fifty Dollars ($250.00) in each accident.

'It is further agreed by and between the parties hereto, that no verbal agreements or understandings of any kind or character have been entered into; that any previous agreements are hereby voided and revoked by this Agreement and that all Agreements between the parties are set forth herein, and that this Agreement shall, at all times, be interpreted under the laws of the state of Ohio.

'Compensation on a per ton basis between authorized points of service will be made according to published schedule (copy annexed). Pick up and deliveries made by the Operator on L. T. L. shipments will be paid at the rate of _____ per cwt., except pick up or deliveries made to connecting lines or delivery carriers the rate will be _____ per cwt. with a maximum of Ten Dollars ($10.00) when the work is performed by the Operator. All truck load or volume shipments pick up or deliveries taking a truck load or volume rating will be made free of charge.

'Settlement will be made on the 15th of each succeeding month, or the operator may draw any money on the books upon the completion of each trip and only when Operator has delivered to Carrier delivery receipts, trip sheets, driver's logs, or any other rec-

ords required to be kept by Carrier. If there are any loss or damages to the freight while in transit by the Operator, of C. O. D.'s, freight charges or other amounts not accounted for, such monies, and amount of any claims, will be deducted from the compensation due Operators.

'Upon the termination of this Agreement, Operator will return to Carrier, any property or equipment belonging to Carrier including documents, papers, identification plates, public utility tax cards, and any other evidence of operating authority belonging to Carrier.

'This Contract shall be effective when approved by a duly authorized agent of the Carrier and shall terminate when all conditions have been complied with by the parties hereto.

'TRACTOR: _____

Make Motor No. Serial No.

_____

License No. State

'TRAILER: _____

Make Motor No. Serial No.

_____

License No. State

'Signed in duplicate this _____ day of _____, 195____.

A. C. E. TRANSPORTATION CO., INC.

'Signed in presence of:

_____ By _____

Carrier

_____ _____

_____

Operator'

"The provision of the leases with Interstate are:

'TRUCK LEASE

'THIS AGREEMENT by and between _____ of _____, LESSOR, and INTERSTATE TRUCK SERVICE, INC. of Martins Ferry, Ohio, Lessee.

'WITNESSETH:

'1. The lessor hereby leases to the lessee the following described vehicle equipment:

Make of Tractor	*Serial No.*	*State*	*License No.*

Wherever it (or they) may be, for a period of _____ commencing at _____ the _____ day of _____ 19___ and expiring at _____ the _____ day of _____ _____19____.

'2. The lessor will furnish for operating of the said vehicle or vehicles the required lubricants and fuel, the necessary repairs and maintenance to keep vehicle or vehicles in proper operating condition, and will also furnish one or more competent drivers, as may be the case.

'3. During the period of this lease the said vehicle or vehicles shall be solely and exclusively under the direction and control of the lessee who shall also be liable to the shipper or consignee for any loss or damage not caused by the operation of the said vehicle or vehicles by the lessee, and for any public liability resulting from the said operation by the lessee subject however, to such, if any, rights or subrogation which the insurance companies of the lessee may have under the circumstances.

'4. Upon the expiration of this lease possession of the vehicle or vehicles will be promptly restored to the lessor.

'5. In consideration of the foregoing, lessee agrees promptly to pay lessor and the lessor agrees to accept

as hire of the said equipment and reimbursement for the services of any driver or drivers the following compensation:

70/75% of The Revenue Accruing to Interstate Truck Service, Inc., Depending on Commodity, Less Charges.

'Signed in quadruplicate this _____ day of _____ 19____.

'It is understood that this agreement may be cancelled by either party upon five days notice, provided that the lessor shall complete delivery of all freight which he may have enroute or under load at the time of notice of cancellation.

_____ Lessor

By _____

INTERSTATE TRUCK SERVICE, Lessee

By _____'

"While the aforesaid leases were in effect the Union and the said Defendant Carriers executed the contract (Ex. 19 and 21 of R.) which is the subject of the controversy. The provisions of Article 32 are:

'Owner-Operators

'Section 1. Owner-operators (See Note), other than certificated or permitted carriers, shall not be covered by this Agreement, unless affiliated by lease with a certificated or permitted carrier which is required to operate in full compliance with all the provisions of this Agreement and holding proper ICC and state certificates and permits. Such owner-operators shall operate exclusively in such service and for no other interest.

(NOTE: Whenever "owner-operator" is used in this article, it means owner-driver only, and nothing in this article shall apply to any equipment leased except where owner is also employed as a driver.)

'Section 2. This type of operator's compensation for wages and working conditions shall be in full accordance with all the provisions of this Agreement. The owner-operator shall have seniority as a driver only.

'Section 3. Certificate and title to the equipment must be in the name of the actual owner.

'Section 4. In all cases, hired or leased equipment shall be operated by an employee of the certificated or permitted carrier. The employer expressly reserves the right to control the manner, means and details of, and by which, the owner-operator performs his services, as well as the ends to be accomplished.

'Section 5. Certificated or permitted carriers shall use their own available equipment, together with all leased equipment under minimum thirty-day bona fide lease arrangements, on a rotating board, before hiring any extra equipment.

'Section 6. Separate checks shall be issued by the certificated or permitted carriers for driver's wages and equipment rental. At no time shall the equipment check be for less than actual miles operated. Separate checks for drivers shall not be deducted from the minimum truck rental revenue. The driver shall turn in time direct to the certificated or permitted carrier. All monies due the owner-operator may be held no longer than two weeks, except where the lease of quipment agreement is terminated and in such cases all monies due the operator may be held no longer than thirty (30) days from the date of the termination of the operation of the equipment.

'Section 7. Payment for equipment service shall be handled by the issuance of a check for the full mileage operated, tonnage or percentage, less any agreed advances. A statement of any charges by the certificated or permitted carrier shall be issued at the same time, but shall not be deducted in advance.

'Section 8. The owner-operator shall have complete freedom to purchase gasoline, oil, grease, tires, tubes, etc., including repair work, at any place where efficient service and satisfactory products can be obtained at the most favorable prices.

'Section 9. There shall be no deduction pertaining to equipment operation for any reason whatsoever.

'Section 10. The Employer or certificated or permitted carrier hereby agrees to pay road or mile tax, social security tax, compensation insurance, public liability and property damage insurance, bridge tolls, fees for certificates, permits and travel orders, fines and penalties for inadequate certificates, license fees, weight tax and wheel tax, and for loss of driving time due to waiting at state lines, and also cargo insurance. It is expressly understood that the owner-driver shall pay the license fees in the state in which title is registered.

'All tolls, no matter how computed, must be paid by the Employer regardless of any agreement to the contrary.

'All taxes or additional charges imposed by law relating to actual truck operation and use of highways, no matter how computed or named, shall be paid by the Carrier, excepting only vehicle licensing as such, in the state where title is registered.

'Section 11. There shall be no interest, or handling charge on earned money advanced prior to the regular pay day.

'Section 12. (a) All certificated or permitted carriers hiring or leasing equipment owned and driven by the owner-driver shall file a true copy of the lease agreement covering the owner-driven equipment with the Joint State Committees. The terms of the lease shall cover only the equipment owned and driven by the owner-driver and shall be in complete accord with the minimum rates and conditions provided herein,

plus the full wage rate and supplementary allowances for drivers as embodied elsewhere in this Agreement.

(b) The minimum rate for leased equipment owned and driven by the owner-driver shall be:

	Per Mile
Single axle, tractor only	9½¢
Tandem axle, tractor only	10¢
Single axle, trailer only	3¢
Tandem axle, trailer only	4¢

75% of the above rates to apply for deadheading, if and when ordered, provided, however, that the 75% rate will apply only on first empty dispatch away from the home terminal; thereafter the full equipment rental rate to apply until driver is redispatched from home terminal; the above rates to be based on 23,000-pound load limit. On load limits over 23,000 pounds, there shall be one-half (½) cent additional per mile for each 1,000 pounds or fraction thereof in excess of 23,000 pounds. There shall be a minimum guarantee of 24,000 pounds for leased equipment owned and driven by the owner-driver. Nothing herein shall apply to leased equipment not owned by a driver.

'The minimum rates set forth above result from the joint determination of the parties that such rates represent only the actual cost of operating such equipment. The parties have not attempted to negotiate a profit for the owner-driver.

'Section 13. Driver-owner mileage scale does not include use of equipment for pickup or delivery at point of origin terminal or at point of destination terminal, but shall be subject to negotiations between the Local Union and Company. Failure to agree shall be submitted to the grievance procedure.

'Section 14. There shall be no reductions where the present basis of payment is higher than the minimum established herein for this type of operation.

Where owner-operator is paid on a percentage or tonnage basis and the operating company reduces its tariff, the percentage or tonnage basis of payment shall be automatically adjusted so that the owner-operator suffers no reduction in equipment rental or wages, or both.

'Section 15. It is further understood and agreed that any arrangements which have heretofore been entered into between members of this Union, either among themselves or with the employer or with the aid of the Employer, applicable to owner-driver equipment contrary to the terms hereof, shall be dissolved or modified within thirty (30) days after the signing of this Agreement so that such arrangements shall apply only to equipment of the owner-driver while being driven by such owner-driver. In the event that the parties cannot agree on a method of dissolution or modification of such arrangement to make the same conform to this Agreement, the question of dissolution or modification shall be submitted to arbitration, each party to select one member of the arbitration board, and the two so selected to choose a third member of said board. If the two cannot agree upon the third within five (5) days, he shall be appointed by the Joint State Committee. The decision of said board to be final and binding.

'Section 16. It is further agreed that the intent of this clause and this entire Agreement is to assure the payment of the Union scale of wages as provided in this Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wage scales provided in this Agreement. This clause is intended to prevent the continuation of or formation of combinations or corporations or so-called lease of fleet arrangements whereby the driver is required to and does periodically pay losses sustained by the corporation or fleet arrangement, or is required to accept less than the

actual cost of the running of his equipment, thus, in fact, reducing his scale of pay.

'Section 17. It is further agreed that if the Employer or certificated or permitted carrier requires that the "driver-owner-operator" sell his equipment to the Employer or certificated or permitted carrier, directly or indirectly, the "driver-owner-operator" shall be paid the fair true value of such equipment. Copies of the instruments of sale shall be filed with the Union and unless objected to within ten (10) days shall be deemed satisfactory. If any question is raised by the Union as to such value, the same shall be submitted to arbitration, as above set forth, for determination. The decision of the arbitration board shall be final and binding.

'Section 18. It is further agreed that the Employer or certificated or permitted carrier will not devise or put into operation any scheme, whether herein enumerated or not, to defeat the terms of this Agreement, wherein the provisions as to compensation for services on and for use of equipment owned by owner-driver shall be lessened, nor shall any owner-driver lease be cancelled for the purpose of depriving Union employees of employment, and any such complaint that should arise pertaining to such cancellation of lease or violation under this section shall be subject to ARTICLE X.

'Section 19. (a) The use of individual owner-operators shall be permitted by all certificated or permitted carriers who will agree to submit all grievances pertaining to owner-operators to joint Employer-Union grievance committees in each respective state. It is understood and agreed that all such grievances will be promptly heard and decided with the specific purpose in mind of

(1) protecting provisions of the Union contract;

(2) prohibiting any and all violations directly or indirectly of contract provisions relating to the proper use of individual owners;

(3) prohibiting any attempts by any certificated or permitted carrier in changing his operation which will affect the rights of drivers under the terms of the contract, and generally the certificated or permitted carriers agree to assume responsibility in policing and doing everything within their power to eliminate all alleged abuses in the use of owner-driyers which resulted in the insertion of Section 19 (Article XXXIII) in the original 1945-47 Over-the-Road contract;

(4) owner-driver operations to be terminal to terminal, except where no local employees to make such deliveries or otherwise agreed to in this contract;

(5) the certificated or permitted carriers agree that they will, with a joint meeting of the Unions, set up uniform rules and practices under which all such cases will be heard;

(6) it shall be considered a violation of the contract should any operator deduct from rental of equipment the increases provided for by the 1955 Amendments or put into effect any means of evasion to circumvent actual payment of increases agreed upon effective for the period starting February 1, 1955, and ending January 31, 1961.

'(b) No owner-operator shall be permitted to drive or hold seniority where he owns three or more pieces of leased equipment. This provision shall not apply to present owner-operators having three or more pieces of equipment under lease agreement, but such owner-operator shall not be permitted to put additional equipment in service so long as he engages in work covered by this Agreement or holds seniority.

Where owner-operator drives, he can hold seniority where he works sixty (60) per cent or more of time.'

"This action was filed and a preliminary injunction obtained against the Union and said Defendant Carriers after they informed the Plaintiff that his leases were about to be cancelled pursuant to said Article 32. According to the testimony of the Defendant Burke, the terms of the contract would have been enforced except for the temporary injunction having been issued (R. 103).

"The contract was entered into after extended negotiations between representatives of the Union Locals and representatives of the Carriers. There has been no picketing or strike action taken. The Plaintiff, as well as numerous other owner-operators, has at all times in question maintained membership in the Union. The Plaintiff personally operates one of the units covered by the leases although his driving has not been regular and consistent.

"The contract in question has been generally adopted by Common Carriers and Locals of the Union throughout the twelve central states including Ohio. It covers in all 3,000 to 3,500 carriers, and 40,000 to 50,000 employees. Four hundred fifty to five hundred of the carriers, and five to six thousand of the employees are in the State of Ohio. Approximately five to ten percent of these employees are owner-operators.

"I have drawn conclusions as follows from a consideration of the pleadings, the evidence and the briefs:

1st—Article 32 of the contract is not within the protection provided by Sec. 157 of the Labor Management Relations Act of 1947 (hereafter referred to as L. M. R. A.) (29 U. S. C. A.);

2nd—Article 32 violates Sec. 1331.01 R. C. of Ohio and is void;

3rd—The Plaintiff will be injured if the parties carry out the provisions of Article 32;

4th—The Plaintiff has no remedy under the L. M. R. A. or any other federal legislation;

5th—Jurisdiction in the state court exists; and

6th—It is the duty of this court to exercise its powers to restrain the parties from enforcing the terms of Article 32.

"As to the Union's claim that its action is authorized it should be observed that Sec. 157 of the L. M. R. A. provides that 'Employees shall have the right to bargain collectively * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection * * *.' Sec. 158d of the Act reads, 'For the purpose of this section, to bargain collectively is the performance of the employer and the representatives of the employees to meet * * * and confer * * * with respect to wages, hours, and other terms and conditions of employment.'

"The Union claims that Article 32 deals with the subject of wages in this way. It asserts that the owner-driver's wages will in effect be reduced if the Carrier is allowed to lease equipment from the owner-driver at a figure less than the actual cost of its operation. The contract provides for an indirect method of protecting his wages against a possible imprudent business venture. I do not believe Sec. 157 can be reasonably construed to permit this remote and indirect approach to the subject of wages. If the contrary is true then it would seem to follow that it is proper in any case to fix the price of an employer's products on the theory that if it is left to him to do he might fix it so low as to ultimately impair his employees' wages and the jobs themselves. The Union claims that the tractor-trailer

here may be compared to the tools which an employee owns and uses in the work. An analysis of the two situations will show material differences. The tractor-trailer represents a very substantial capital investment, whereas the tools do not. The tractor-trailer has been made the subject of a separate and distinct business transaction in which the owner has transferred all or part of his interest in the same for a time to another party for remuneration. This is not the case where the employee retains his interest in his tools and makes such use of them that they become an integral and inseparable part of his labor. It is significant in this connection that the Union and the Defendant Lessee-Carriers themselves have in their contract separated the subject of the owner-driver's tractor-trailer from the subject of his labor. The subject matter dealt with in Article 32 with respect to altering the provision of the leases was outside the legitimate scope of 'wages, hours, and other terms and conditions of employment.' And this is true in my opinion, irrespective of whether the Plaintiff's technical status is that of employee or independent contractor. (For a list of some of the subjects that may be included in other 'terms and conditions' in a collective bargaining agreement, see *Forkosch, A Treatise of Labor Law*, p. 874.) The case of *Los Angeles Pie Bakers Association v. Bakery Drivers Local* (Calif.), 264 Pac. 2d, 615, brings no support to the Union's claim. There the Union sought to change the method of payment of the owner-driver who used his truck in the distribution of pies. For his equipment the Union proposed that he receive compensation based on a designated discount from the retail price. This said the Court is the equivalent of wages for overall services. The fixing of prices of the pies was not there involved. Neither was there any proposed negotiation concerning the delivery wagon that the owner-driver retained in connection

with the rendition of his services. The cases cited by the Court at page 619 of its opinion show that it recognized that a contract between a union and an employer group in fixing prices of commodities would be contrary to the anti-trust laws of that state.

"The argument that is premised upon the workmen's right to organize and negotiate in concert under Section 157 of the L. M. R. A. was made by a union to support its action in maintaining control over the catching, marketing and price fixing of fish, in *Commonwealth v. McHugh*, 93 N. E. 2d, 751 (Mass.). In rejecting the claim, the court said,

> P. 760, 'We cannot agree with the defendants' argument that they have done nothing more than engage in ordinary labor union activities for the purpose of improving their economic condition. Doubtless their ultimate purpose was to improve their economic condition, but that is the purpose of all persons who engage in monopolistic enterprises.'

"Like all rights created by law, the rights created by Section 157 in favor of organized employees is not absolute as the Union seems to contend. It is limited in extent and relative in character and must be balanced against competing rights of other persons and the public. Each and every case to which any reference has been made in which the court enjoined the union from continuing a course of tortious conduct, or allowed damages for same, conclusively rebuts the Union's contention that its right to act in concert carries unqualified immunity.

"Article 32 of the contract undoubtedly violates Section 1331.01 R. C. of Ohio. The statute provides:

> '1331.01 Definitions. (G. C. Secs. 6390, 6391.)
>
> 'As used in sections 1331.01 to 1331.14, inclusive, of the Revised Code:

(A) "Person" includes corporations, partnerships and associations existing under or authorized by any state or territory of the United States or a foreign country.

(B) "Trust" is a combination of capital, skill, or acts by two or more persons for any of the following purposes:

(1) To create or carry out restrictions in trade or commerce;

(2) To limit or reduce the production, or increase or reduce the price of merchandise or a commodity;

(3) To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or a commodity;

(4) To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state;

(5) To make, enter into, execute, or carry out contracts, obligations, or agreements of any kind by which they bind or have bound themselves not to sell, dispose of, or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a standard figure of fixed value, or by which they agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity, or transportation between them or themselves and others so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine, or directly or indirectly unite any interests which they have connected with the sale of transportation of such article

or commodity, that its price might in any manner be affected.

A trust as defined in division (b) of this section is unlawful and void.'

"It appears on the face of the contract under attack that all essential elements to constitute a violation exist. There are restrictions and restraints imposed upon articles that are widely used in trade and commerce. Such restrictions are the direct and inevitable result of the concerted action of the Union combining with a non-labor third party in a formal contract. The restraints imposed are not reasonable in character and thus countenanced in the law. The restraints in question are unreasonable. Their effect is to oppress and destroy competition. They preclude an owner of property from reasonable freedom of action in dealing with it. In the *Greater Cleveland Livery Owners Association* case, 74 N. E. 2d 104, at p. 106, His Honor, Judge McNamee, quotes the following pertinent statement from Chief Justice Fuller in *U. S. v. E. C. Knight Co.*, 'Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.'

"None of the authorities cited support the Union's claim that Article 32 does not constitute an unreasonable restraint of trade. The case law strongly indicates the contrary. See *Allen Bradley v. Local Union No. 3*, 325 U. S. 797; *Giboney v. Empire Storage and Ice Co.*, 336 U. S. 490; and *Commonwealth v. McHugh, supra.* The following language of the Court in the *Giboney* case answers much of the Union's claim in the present action:

'It is too late in the day to assert, against statutes which forbid combinations of competing companies,

that a particular combination was induced by good intentions.'

and further, at page 841:

'To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy and might conceivably make it impossible for them to enforce their antitrade restraint laws. See Allen Bradley Co. v. Local Union No. 3, I. B. E. W. 325, U. S. 797, 810, 89 L. ed. 1939, 1948, 65 S. Ct. 1533.'

and at page 844:

'* * * They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade * * *

'While the State of Missouri is not a party in this case, it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way * * * We hold that the state's power to govern in this field is paramount * * *'

"It is self-evident that performance of the terms of Article 32 will injure the Plaintiff. His power to exercise rights incident to ownership over property in which he has an interest is materially limited. It is an injury or damage that the law recognizes. The fact that such injury cannot be fairly measured in a law action for damages is the basis for this action in equity.

"Pronouncements of the U. S. Supreme Court give a clear standard for determining the issue as to jurisdiction.

The rule is simply this: If the Federal enactments provide a remedy in a federal board or court, the jurisdiction of the state court is impliedly excluded. If the Federal law fails to provide any such remedy, the state court's jurisdiction remains. See *Allen Bradley Local v. Wisconsin Employment Relations Board,* 315 U. S. 740; *Garner v. Teamsters Union* 485; and *United Construction Workers v. Laburnum Construction Corp.,* 347 U. S. 656. The L. M. R. A. provides no remedy for Plaintiff's complaint. Under that act, the Defendant Union cannot be charged with any tortious conduct. The Act (Sec. 158 being the pertinent part) does not prohibit the conduct herein involved. The state court does not lose jurisdiction over the grievance for the alleged reason that all the parties are engaged in interstate commerce. In support of this statement see, *International Union of U. A. W. A. v. Wisconsin Employment Relations Board,* 336 U. S. 245, 254; and *Commonwealth v. McHugh, supra.* If the Union's broad claim that the exclusive jurisdiction to regulate the interstate motor truck industry deprives the court of jurisdiction over this wrong to the Plaintiff, then it would seem to follow that the driver of the vehicle engaged in such commerce would not have to respond in the state courts for damages resulting from his negligence in the state. Nor in that situation could the state enforce its speed laws against such driver. The correct answer would seem to be that the state is not regulating the motor industry in applying its anti-trust laws in this manner.

"Considerable has been said in the briefs concerning the Plaintiff's status under the leases. It is my thought that his status as to being an employee or independent contractor in no manner conditions his right to prevail. This action does not involve any issue about the Plaintiff's right to organize owner-drivers. Apparently that has been

done within the trucking industry without a challenge being made by anyone. For this reason, those cases involving controversies as to organizing business workers are not discussed. According to the 'right of control' test applied by His Honor, Judge Goodrich, in the case, *N. L. R. B. v. Nu-Car Carriers,* 189 Fed. 2d 756, the Plaintiff's status is that of an independent contractor. And I accordingly fix his status as such under the leases. The legal consequence of his being an independent contractor is that the L. M. R. A. expressly excludes him from its provisions. Section 4 of Article 32 of the contract, however, would make him an employee of the Lessee.

"A question arises concerning the effect of the Plaintiff being a member of the Defendant Local that negotiated and executed the contract which is the subject of his complaint. Why isn't he in the same position as though he personally executed the challenged contract? In the *Young v. Cooperage Co.* case, 164 O. S. p. 491, His Honor, Judge Zimmerman said, '* * * Plaintiff as a Union member was represented by the Union in the agreements made between it and Defendant and was bound by their terms.' Representation that binds a party is the kind that is based upon express or implied authority that has been delegated. In the present case, the Union negotiated as to a capital investment of one of its members on subjects that do not directly concern his wages, or hours, or other terms and working conditions. Also it does not seem likely that implied authority would be delegated to the Union to act for a member in making a contract prohibited by law.

"Counsel for the Plaintiff shall furnish a journal entry that appropriately provides for complete and effective relief. It shall allow proper exceptions." (End of Judge Colopy's finding.)

Our petition is drawn on the claim that Revel Oliver as an owner and operator of motor equipment used in the transportation business has had his contractual rights over his equipment destroyed by the Contract known as the Central States Area Over the Road Motor Freight Agreement, a contract to which he was not a party, and to the terms and conditions of which he has never assented; that for a long period of time prior to the execution of said Contract by the Defendant carriers and union, he was under an enforceable contract of lease of his personally owned automotive equipment with the Defendants A. C. E. and Interstate; that particularly Section 32 of the Carrier-Union Contract fixes and determines a minimum by which all lessors of equipment for the business of motor truck transportation in Ohio, which is binding upon all carriers and constitutes an effective way of fixing the rates for the use of all leased equipment used in the motor truck industry. This Contract is in and of itself an agreement and combination between the carriers and union which violates the provisions of R. C. 1331.01.

The evidence showed the Plaintiff, Revel Oliver, is a resident of Summit County, living at 210 Winchester Road, Akron. He has been in the trucking business for some twenty-three years, is married and has one child. He operates and drives six tractors and four trailers of a value of approximately $45,000. He operated under leases prior to the Central States Contract; under the operation he pays his drivers; hires and pays them social security, unemployment insurance; he furnishes tires, oil, gas and repairs and buys, pays for and holds the title to the equipment which he leases.

The defendant carriers are what are customarily known as common carriers, companies, who by virtue of permits issued by State and Federal authorities are au-

thorized to transport merchandise, tires, rubber goods and various commodities. In the course of their operations, they own some of their equipment, i.e., tractors, trailers and trucks and employ drivers of their own to operate these pieces of equipment. The equipment necessary to the operation of their business not owned by them is leased from Plaintiff and other owner-operators and is essential to the carrying on of the motor truck industry. Both are covered by the contract covering the period from February 1, 1955 to January 31, 1961.

Local #24 is a labor union, whose business agent is Kenneth Burke, and affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, of which Mr. Dave Beck is President and James Hoffa, one of its Vice Presidents, who are signatories to the Agreement referred to.

In January of 1955, representatives of the Teamsters Union met with the representatives of private, common and contract carriers of Ohio and eleven other central states, in Chicago, and entered into the contract complained. At this conference Plaintiff and the owners of motor equipment leased to common carriers did not participate and it is the making of this contract that constitutes a violation of 1331.01 and tends to create a monopoly and fixing the price to be uniformly charged for the use of leased equipment that is prohibited by the laws of Ohio.

We wish to make clear that Plaintiff does not question the right of the Defendants to make a contract governing the wages, hours and conditions of employment of the employees of the Carriers. We direct our attention to the provisions of the Contract which provide for a fixed rate per mile for all equipment owned and operated by this Plaintiff and leased by him to carriers in Ohio.

These specific items are contained in Section 32—a separate, distinct and separable provision which was entered into for the avowed purpose of breaching Plaintiff's existing leases, for the purpose of fixing a uniform charge for the use of and income from leased motor equipment, clearly distinct and distinguishable from the fixing of wages, hours and working conditions of Defendant carriers employees.

The enforcement of Section 32 vs. Plaintiff definitely violates 1331.01 by

First; Fixing minimum prices which the carrier must pay and a minimum charge which the owner must make for the use of equipment, which he leases to the carrier.

Second: The Contract establishes prohibitive restrictions and penalties which prevent the carriers from leasing and thus limits the number of pieces of equipment which may be in the competitive market.

This is not a labor dispute. We do not contest the right of the Union to represent the employees of the carriers for collective bargaining purposes and to enter valid contracts covering employees regarding their wages, hours and conditions of employment and the improvement of their conditions. However, where as here the Plaintiff creates capital, saves it and invests it in motor trucks and equipment which he owns and leases for a money consideration, by way of percentage, tonnage or mileage, that any arrangement, combination or contract which is created whereby competition either in the supply or the price charged for the use of such equipment is restrained or prevented, or if it tends to produce this result, of restraint, or whereby the free pursuit of any lawful business by this Plaintiff is restrained or restricted that that constitutes a clear violation of the Valentine Act of Ohio; and acts con-

ducted or contracts made in violation thereof are subject to injunctive order of the Court.

The evidence in this case shows that prior to January, 1955, Plaintiff was engaged in the pursuit of a lawful business. He owned and operated his tractors and trailers leased to the Defendant carriers.

In January, 1955, the Central States Area Over-the-Road Agreement was made covering Ohio operations and containing the objectionable Section 32 dealing only with owner-operators. This Contract deals not merely with the rights of union, carrier and employees but with the fixing of price for the use of *equipment*, personal property as distinguished from the price of *labor* and thus interfering with the lawful pursuits of the Plaintiff in a legal business, a field in which neither carrier, union nor owner-operator have a right in which to engage and any agreement, or combination between any of them fixing or restricting the price for the use of equipment used in the business is illegal and void under 1331.01.

The Contract in evidence speaks for itself. By its very words it condemns the Defendants and establishes our claim of monopoly. It has uniform application throughout Ohio and covers and intends to cover private, common and contract carriers, exclusive only of railroads and bus lines. Its enforcement has already resulted in the elimination of owner operators from the competitive field, a result demanded by the Teamsters in public hearings on numerous occasions; the enforcement of its provisions places an unlawful restraint upon the Plaintiff in the pursuit of his business and requires him to pay for feather-bedding services, for which he neither contracted nor which he desires, which places a large and illegal burden upon his lawful pursuits. Contracts involved herein are set forth in Judge Colopy's findings, *supra*.

THE QUESTION BEFORE THE COURT.

"Does the Over-the-Road Agreement executed by the Defendant Carriers and Unions as it applies to the rate structure to be charged for the use of and operation of equipment leased to the Carriers constitute a violation of the Valentine Act of Ohio?"

As previously stated, we are not here concerned with a labor dispute. Nor do we seek an interpretation of nor attempt an assault upon the Agreement as it deals with the wages and conditions of employees of the carriers nor the right of the Union and Carriers to negotiate and execute a collective bargaining contract covering the subject matter, which is within their field to negotiate.

Our problem here is, may the Carriers and Union fix by agreement the price to be charged for the use of and the supervision of the trucks and trailers used in the trucking business, owned by individuals who lease the equipment to the carriers? This and nothing else is here involved.

DISCUSSION OF THE TESTIMONY.

The first witness called was Kenneth A. Burke, President and Business Agent of Teamsters Local Union Number 24 in Akron, Ohio. Among his duties are the enforcement of the Teamsters' Working Agreements including the Central States Area Over-the-Road Motor Freight Agreement. The Contract in question was identified by him and speaks for itself.

He also identified the Teamsters Constitution and both Contract and Constitution, identified as Plaintiff's Exhibits 1 and 2 respectively, were received in evidence.

By counsel, it was stipulated that the Contract:

"is the uniform agreement which we seek to negotiate and get the signature to of every employer, whose

employees represent that type of operation in such uniform agreement." (page 40.)

The second witness called was the Plaintiff, Revel V. Oliver, married, living in Akron for sixteen (16) years, the owner-operator of six tractors and four trailers, which he leases to A. C. E. Transportation Company of Akron and Interstate Truck Service. His Certificate of Title and his contract with A. C. E. were identified. Other equipment and leases were similarly identified and showed his leasing of equipment to the Defendant-Carriers from 1952 to 1955.

With the A. C. E., his financial remuneration is based on tonnage hauled for both equipment and driver. He pays the driver and his Social Security. His own wages as driver comes out of the gross earnings of the tonnage rate. Carrier does not make a separate check for him and his equipment. He pays Ohio Driver's Insurance. He pays union dues for his men, bridge tolls and full permits. He pays for tires, oil, gas and repairs. At A. C. E. the Company pays New York and Ohio ton-mile Tax, but at Interstate he pays for both. He pays for collision, fire and theft insurance on the equipment and neither carrier has any investment of any kind in the equipment. He must use this equipment in the service of the carrier covered by the lease. His remuneration at A. C. E. is on a tonnage rate. At Interstate, it is percentages depending on commodity hauled.

The terms of the Union agreement were never presented or discussed with him at any union meeting. He gets nothing for dead-heading. He pays for health and welfare to the Union.

As an example of what he must pay for delivery. Exhibit 18 shows he paid Thirty-Five Dollars and Ninety-one Cents ($35.91) on that occasion, representing a half or

possibly one full day. Exhibit 15 shows a charge of Twenty-Six Dollars and Fifty-two Cents ($26.52) paid a city man, all of which comes out of his remuneration. Under the Over-the-Road contract the carrier must pay for dead heading. Under the lease the owner-operator is not paid for dead heading. He hires his own drivers and pays them the union scale. He pays for social security, compensation insurance. The purpose of showing the foregoing is to establish the Plaintiff as an independent contractor and not as an employee of the carrier, although the lease between the carrier and Plaintiff clearly designates him as an independent contractor.

Mr. Burke was recalled by the Defendant Union and testified between four hundred fifty (450) and five hundred (500) carriers in Ohio are parties to the Over-the-Road contract and that between five thousand and six thousand employees work under its provisions (page 96) and that between five and ten per cent of the six thousand (6000) are owner-operators; that between three and five thousand employers are covered by this "Uniform Over-the-Road Agreement in the Central States" with forty-five thousand to fifty thousand employees.

All employers in Mr. Burke's district have signed Exhibit 1.

> "Q. But for the injunction Judge Harvey issued in this case you would have enforced the terms of that agreement in your area, wouldn't you?
>
> A. I would have to say yes."

Frank O. Blunden, vice-president of Kramer Bros. Freight Lines of Detroit was called as a witness for the Union. He testified as to long service in the trucking industry and as a negotiator of the Contract (Exhibit 1) and previous contracts and that for a long time owner-operator provisions have been written into the area agree-

ments and concerning negotiations over the years. There haven't been very many changes until you come to equipment rental and dead heading. Rates have been changed from time to time and dead heading at union's insistence.

No. 19 of Section 32 is a compromise between the Union position that it should abolish all owner-operators and the companies' contention that there should be no limitation.

In 1952 the Union attempted to further curtail owner-operators.

He has read statements by Mr. Wheeler in behalf of the Union that owner-operators must go. On page 134, the following question and answer was given:

"Q. And directing your attention to Section 19, do I understand your testimony correct that that section was written as a result of a claim by the Union that it desired to abolish all owner-operators, and that the carriers desired that no restrictions be placed on the owner-operator's lease?

A. That was just about it.

Q. But up to two years ago you would say to this Court that the experience of your company was that you could operate cheaper with operator owned equipment than with company owned equipment?

A. I would say that would be a fact.

Q. All right. Now, could you give me any idea how many, if any, owner-operators have had a case before the grievance committee arising out of any of these contracts?

A. The number of them, Mr. Denlinger?

Q. Yes.

A. No. There have been very, very few."

"Q. Let me ask you, Mr. Bluden, during the many years of negotiating with the Teamsters Union for this type of agreement which is Exhibit 1 here, you have been the Chairman of the Michigan Association, or

the people that negotiate for that State with the chairman and committee of union, is that right?

A. That is correct."

"Q. What I am trying to get at, did you not learn that in Ohio until very recent years there was no effective agreement between carriers and the union with reference to owner-operators? A. Well, now if you put effective, I don't know. Would the union be able to enforce the owner-operator clause? I would agree with you they couldn't. They didn't."

"Q. So that in 1952 the union's policy to abolish all owner-operators was being urged by them and the result of the negotiations was the preparation of Section 19, that correct? A. Well, I can't agree with you that union was sincere in abolishing all owner-operators.

Q. Was that their argument? A. Well, the argument for the union was that there were certain abuses by the companies.

Q. And to omit or get rid of those abuses you should abolish the owner-operators?

A. Well, in negotiations, there are certain things said that come out, but—

Q. Was that said? A. The Union was trying to control the operators' uses of owner equipment."

"Q. You don't want to retract your statement that Section 19 came about because the union said that all owner-operators would have to be abolished?

A. Unless there could be a control.

Q. Will you answer my question, what do you mean by control of the owner-operators?

A. That is, he would secure a living wage plus an adequate rental for his equipment.

Q. In other words, the union insisted on representing him in connection with his equipment.

A. Right.

Q. And fix a rate that would have to charge for the use of his equipment?

A. A rate that was supposed to protect him from using any of his driving wage for his equipment.

Q. But the result of it was a restriction upon the owner-operators as to the minimum that he dare charge for the use of his equipment?

A. That is correct."

DISCUSSION OF LAW.

The subject of monopoly has long been one of our problems for the consideration of our Courts. The power of the state to prohibit or regulate combinations in restraint of trade is as old as government itself.

In fact, the Supreme Court of Ohio as early as *Lufkin Rule Co. vs. Fringeli*, 57 Ohio St. 596 (1898), said a contract in restraint of trade extending over the entire state is contrary to public policy and invalid, even in the absence of statute. On page 603, the Court says:

"The presumption of illegality arises from the fact, that any restraint of the kind tends to oppression by depriving the individual of the right to engage in a pursuit or trade with which he is generally most familiar, and, consequently, the community of the services of a skillful laborer; and the general effect must be, more or less, to encourage idleness, and affect the price of such things as had been produced by his labor. These are the general reasons against any restraint of trade; and being founded in the nature of things cannot be materially varied by any change in the times and circumstances of a people."

And again on page 606, the Court says:

"Certainly we are not called on to relearn how little human cupidity can be trusted when it has the opportunity to enrich itself at the expense of others. A disposition to overlook this feature only shows how far, in some cases, we are getting away from the salutory principles of the common law, which never

permitted a person to occupy a position in which his duties were opposed to his interests."

The statutory law of Ohio follows the common law of Ohio, which condemned combinations tending to create a monopoly and uniformly hold that the vice of the combination arises not from the mere increase or reduction in price, but from the fact the combination has the *power* to control prices. *Emery vs. Ohio Candle Co.*, 47 Ohio St. 320.

The common law and the Valentine Act restricts combinations which "directly or indirectly preclude a free and unrestricted competition among *themselves*, purchasers or consumers." Actual stifling of competition is not necessary. The question is:

"Is the practical tendency to that effect?" *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 686. The combination, not the mere intent, is condemned. *Standard Oil Co.*, 49 Ohio St. 137. In *Scofield vs. Lake Shore Railway*, 43 Ohio St. 571, the Supreme Court of Ohio held that it was unlawful for a railroad to make a contract with a shipper to allow rebates on freight rates to the prejudice of other shippers; that such an agreement "tends to create a monopoly," "destroy competition," "*injure, if not destroy*," the business of smaller operators, and is contrary to public policy and will be declared void at the instance of the parties injured.

Is the contracting for and leasing of motor equipment when fixed by a standard figure for the entire State of Ohio within the inhibitions of the foregoing section? The answer is found in the case of *Cullitan vs. Greater Cleveland Owners Association*, 35 Ohio Opinions 68, 74 N. E. (2d) 104, April 2, 1947.

This action was brought by the State of Ohio on relation of the prosecuting attorney of Cuyahoga County, Ohio. An association was formed in Cleveland, Ohio, of

twenty four automobile livery owners who furnish livery service to the funeral directors of Cuyahoga County. The approximately two hundred forty six funeral directors of Greater Cleveland when necessary hire this equipment. Since many of the funeral directors have their own equipment, they act in this respect in direct competition with the livery owners.

The association then fixed a zone schedule of rates and proceeded to notify the funeral directors of the increased rates in the zone. It was conceded that the established rates are reasonable and warranted by higher costs. The increase in price of livery service is ultimately passed on to the general public. The Court granted the injunction requested.

Its reasoning is judicious and righteous. We quote (page 106):

> "There can be little question that the auto livery business is 'trade' as that term is used in the statute. The word 'trade' is not to be interpreted in a narrow sense as importing only the buying, selling or exchanging of commodities."

(Page 107):

> "But neither considerations of sympathy nor an appreciation of the apparent need for economic unity in dealing with a larger interest will permit a court to disregard unambiguous terms of the statute. * * * The statute makes no distinction between large and small combinations. Its terms are precise and plain. It denounces 'a combination of capital skill or acts by two or more persons.'
>
> "The fact that the increased prices are reasonable does not relieve against the application of the provisions of the statute.
>
> "Any combination which tampers with price structures is engaged in an unlawful activity.

Even though the members of price-fixing group were in no position to control the market, to the extent that they raise, lower or stabilize prices they would be directly interfering with free flow of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference."

(Page 108):

"that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."

"the anti-trust acts are violated by any agreement, understanding, combination, association, plan or club, between, among, or composed of those engaged in the same business although called by a name indicating apparently existing competition or openly setting out only worthy objects not in conflict with such acts, the effects of which is to secure harmonious action among the operators or members in relation to the regulations of price, the limitation of production or the division of business or territory."

The Valentine Act further provides the combination shall be illegal if it has any connection with the sale or "transportation" of the article or commodity. Surely, the Legislature did not intend thereby to exclude a combination engaged in the fixing of price of "equipment used in transportation."

Furthermore, the Act restricts any combination which "directly or indirectly preclude a free and unrestricted competition among themselves, purchasers or consumers in the sale or transportation of such article or commodity." Actual stifling of competition is not necessary—practical tendency to that effect is sufficient. It is the power in the combination which is condemned and not the intent. *Scofield v. Lake Shore*, 43 Ohio St. 571.

The Supreme Court in the *Lake Shore* case said:

"Where such a corporation, as a common carrier, in consideration of the fact that a shipper furnished a greater quantity of freight than the other shippers during a given term, agrees to make a rebate on the published tariff on such freights as to the prejudice of the other shippers of like freights under the same circumstances."

"Such a contract is an unlawful discrimination in favor of the larger shipper, tending to create monopoly, destroy competition, injure, if not destroy the business of the smaller operators, contrary to public policy and will be declared void at the instance of the parties injured thereby."

McAllester v. Trumbull County Building Trades Council, 12 Ohio Opinions 179. This is an excellent case on Monopoly and General Code 6391. Common Pleas Court, Trumbull County, July 19, 1938. Judge Griffith:

"A building trades council may be enjoined from using so intimidating measures tending to cause lumber dealers and material supply companies to withdraw their business from a building contractor."

"Where a building trades council circularizes resolutions calculated to interfere with plaintiff in entering into contracts with material men and dealers in building supplies and coerce them to refrain from doing any business with this plaintiff such acts created secondary boycott, the enforcement of which will be enjoined."

Judge McNamee, now Federal Judge in Cleveland, wrote the opinion in *State vs. Greater Cleveland Livery Owners Assn.*, reported *supra*, holding that an association of auto livery owners, furnishing livery service to funeral directors, in fixing increased prices for their services, were engaging in unlawful acts tending to monopoly in viola-

tion of the Valentine Act. He draws comparison between the Sherman Act and the Valentine Act and discusses State and Federal decisions as well as citing summarization in 27 *Ohio Jurisprudence,* Section 16, page 170.

Needles vs. Bishop, 14 O. D. (N. P.) 443, held a contract in partial restraint of trade is void if monopolistic in character. This is provided also by Revised Code 1331.06.

City of Dayton vs. Hickle, 122 N. E. (2d) 40, holds:

> "The Statute authorizing municipalities to establish and enforce ordinances for hackney coaches, cabs or omnibus is unconstitutional as affording the opportunity to create a monopoly by fixing cab stands restricted to the use by one cab company exclusively."

To this point, we have confined our citations and discussion to Ohio cases and which we think amply furnish authority for the Court's jurisdiction and the relief granted. However, since sister states have been confronted with the subject, restraint in trade, we shall cite some of these decisions.

It is well settled in Illinois that an agreement between contractors bidding for work, which tends to suppress or stifle competition, is against public policy and, therefore, void.

> *Conway vs. Garden City Paving,* 190 Ill. 89;
> *Ray & Whitney vs. Mackin,* 100 Ill. 346.

As in Ohio, intent or actual accomplishment is not an ingredient in restraint of trade, so Massachusetts has stated:

> "If the effect of the activities of the labor organization is to restrain trade, it is immaterial that such was not the specific intent, and that the activity was taken to the benefit of its members."

A. T. Stearns Lumber Co. vs. Howlett, 260 Mass. 45 (1927). This is a long, well reasoned case on Labor Union Monopoly and sustains plaintiff's position.

A late case from the Supreme Court of Texas supports plaintiff's position, entitled *Best Motor Lines vs. Int. Bro. of Teamsters, Chauffeurs, etc.*, 237 S. W. 2d 589 (1951). This case involved the Texas Anti-Trust Statutes in which the Teamsters Union was defendant. The Court held the statutes valid and that all persons are subject thereto and the Courts have the power to enjoin acts and conduct in violation thereof and labor unions are not excepted, even though there exists a labor dispute and the picketing is peaceful.

Lawyers and Courts are always searching for that decision on all fours with his own problem. Seldom is our wish granted. But *Commonwealth vs. McHugh*, 326 Mass. 241, seems to be the answer here. On the question of jurisdiction of the State Court; on the facts; on the logic and reasoning of the decision and as it enunciates the law of Massachusetts on the subject of Labor Unions, Monopoly and Restraint of Trade, we submit this as a controlling decision.

The coupling of legitimate trade union objectives with unlawful commercial objective does not save combination. *Klob vs. Pacific Maritime Assn.*, 141 F. Supp. 264.

The Statute regarding restraint of trade is inapplicable to concerted activities carried on by members of labor organizations for lawful objectives, but applies to such activities for unlawful objectives, resulting in restraint of trade. *Adams Dairy, Inc. v. Burke*, 293 S. W. (2) 281.

A labor group is not immune from Sherman Act liability if the proof, as distinguished from the indictment allegations, shows that it was combined with non-labor

groups to effect an unlawful restraint upon trade and commerce.

Exemption from liability is restricted to activity occurring in a labor dispute as term is used in Norris-LaGuardia Act, Sherman Anti Trust Act. *Gulf Coast Shrimpers, etc. v. U. S.*, 236 F. (2) 658.

The legislative intent of both State and Federal legislators are identical.

The purpose of the Sherman Anti-Trust Law as the state law of Ohio is the

(a) Preservation of a system of free competitive enterprise.

(b) Protection of public against the evils incident to monopolies and contracts *tending* (emphasis added) directly toward unreasonable suppression or restraint of interstate commerce.

The Act was upheld and interpreted in *Paramount Famous Lasky Corp. vs. U. S.*, 282 U. S. 371 and *U. S. vs. Parker Rust Proof Co.*, 61 F. Supp. 805.

In the case of *U. S. vs. International Fur Workers Union*, 100 Fed. (2d) 541 (2 U. S. Cir. 1938), the Union was liable for advising employers to join a corporation whose purpose is known to be a suppression of competition. Certiorari was denied. 85 Law. Ed. 1051.

We trust that we have made it clear to the Court throughout that we make no claim that the Teamsters Union as a union constitutes an illegal restraint of trade. This thought is in full accord with the statement in 58 C. J. S., Sec. 79, page 1069.

"Labor Unions are not monopolies or combinations in restraint of trade, but, unless exempt from the statute may be guilty of conduct in violation of State anti-trust statutes."

An examination of the Ohio statutes clearly shows labor unions are not exempt from the provisions of Revised Code 1331.01 et seq.

> "While it is clear that the combination itself is not a monopoly or in restraint of trade, it is equally clear that like combinations of capital, it may be guilty of acts which are in restraint of trade."
>
> *Michaels vs. Hillman*, 183 N. Y. S. 195;
> *Campbell vs. Motion Picture Op. Union*, 151 Minn. 220.

In the case at bar, it is the over-the-road contract between the Carriers and Union that fixes uniform charges for equipment not owned by the Union or Carrier but by a third party that creates the monopoly and the restraint of trade prohibited by Revised Code 1331.01 et seq. It matters not that, as testified by Mr. James Hoffa in the Court of Appeals the Union had to force the Carrier to sign with a shot-gun at the Carrier's head.

Respondent has not relied on the illegal contract for the leasing and use of his equipment. He has relied wholly on his lease. He has not sought to retain the benefits, if any, under the Union contract and repudiated the unfavorable. He has relied on his lease for remuneration and upon it only. He has attacked the contract of the Union and A. C. E. as it pertains to leasing equipment and its use as a violation of Ohio's monopoly laws and an unjustifiable interference with his right to contract for the use of his equipment, in which he alone has invested his capital, and on whose frugality, enterprise and good management, success or failure depends, since the illegal union contract, by its very terms attempts to supersede and replace his own voluntary agreement with his lessees.

First, we determine who is Oliver, the Plaintiff. Is he an employee, for the Union may represent employees only? Is he an independent contractor? The lease itself says so, but let us not depend upon the cognomen given by the parties. As was once quite correctly said, you determine the contents of a box by an examination of *what is* in the box and not by the *label* on its top or side.

This question of whether Oliver is an independent contractor or an employee is a question of fact, which the lower Courts had the full right to determine. The lease and evidence conclusively eliminate the master and servant relationship and clearly establish that of carrier and independent contractor.

Next, we look to the Federal Labor Management Act to see if this independent contractor is covered Federal wise. We find he is specifically excluded by the very provisions of the Act.

The Purpose Clause of the Act in part reads (Title 29, Sec. 141):

> "to prescribe the legitimate rights of both *employees* and employers. * * *" (Emphasis ours.)

and to

> "protect the rights of individual *employees* in their relations with labor organizations" etc. (Emphasis ours.)

Section 151 stresses "wage earners in industry" and the right of employees to organize.

In these sections there is no inclusion of an individual such as this Respondent, but in defining employee, Section 152, it says specifically:

> "Employee shall include * * *" "but shall not include * * * any individual having the status of an independent contractor."

Not only is he without relief in Federal Court but by the Act itself he is specifically excluded.

There is no doubt that if the Respondent is given no relief by the Act and there is no remedy provided for him, recourse may be had to the proper state tribunal. The jurisdiction of this Court is clear.

The next problem is whether the over-the-road contract, its purpose and application is violative of the anti-trust laws of Ohio. If it tends to create a monopoly and eliminate the Respondent from competition in this field, then relief by way of injunction should be granted.

Free enterprise is the key which unlocks the combination of resources, employers, workers, market and new enterprises.

Motor truck transportation is one of the most important industries. It is the link between many industries. It may mean hardship and deprivation to millions in cities depending upon the motor truck to bring them food and supplies. Its importance in defense of our country is within the living memory of us all. Of all things, the public as a whole is concerned with, and affected by, transportation of the food of life and the supplies and finished products of our factories, is dependent upon the motor truck transportation operations. Here, there must be free enterprise. Here carriers must not make conditions and restrictions on the free enterprise system of our country by contracting with a Union to drive owners of motor equipment out of business or to fix their income, or restrict their right to compete in the field of furnishing a most substantial part of the rolling stock. Here, the law must not permit anyone through the guise of a labor-management contract to "control the air, land and sea."

The Constitutional questions raised by the Union do not require answers in order for this Court to reach a deci-

sion. As stated in *Harmon v. Brucker*, 78 S. Ct. 433, decided March 3, 1958:

> "It is the duty of Supreme Court to avoid deciding constitutional questions presented unless essential to proper disposition of a case"

and so the Court proceeded to "look first to the petitioner's nonconstitutional claim that respondent acted in excess of powers granted him by Congress."

A little later in *Local 1976, etc. v. National Labor Relations Board*, 78 S. C. 1011, decided June 16, 1958, this Court said:

> "It is the business of Congress and not the business of the Supreme Court to declare policy; the judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted."

These statements should convince the average law student or critic that the claim sometimes made that the U. S. Supreme Court is a policy making tribunal is wholly untrue and that it is following the traditional concept of government as expressed by the three branches and is not whittling the Constitution away by passing upon Constitutional questions not essential to the proper disposition of the case.

The *Local 1976* decision unequivocally states a further proposition that:

> "The National Labor Relations Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice."

We trust we may go one step further here and say the law of Contracts has not been pre-empted to the National

Labor Relations Board, nor has it been designated by Congress as the sole tribunal in which issues arising over contracts shall be adjudicated.

An examination of the pleadings, the evidence and the finding of the trial court (later approved by both the Appellate and Supreme Courts of Ohio) clearly shows an utter void of unfair labor practice or boycott. While this Court found that a hot cargo provision in a collective bargaining agreement is not a defense to a charge of unfair labor and under such circumstances made the foregoing pronouncements *supra*, we have in the instant case provisions in a contract that are violative not of the Federal Labor Management Act but of Ohio's monopoly laws. Certainly if a hot cargo provision in a collective bargaining contract is no defense to an unfair labor practice and the Labor Board charged with the duty of enforcing the National Labor Relations Act and not clothed with a general commission to police collective bargaining agreements, a State Court would not be prevented by any theory based on pre-emption to refuse jurisdiction of a cause involving injury to a person, exempted from the operation of the Act itself and the question as to whether the contract provisions strike down the provisions of his own contract with the carrier and constitute a violation of the civil and criminal laws of the State.

This brings us to a consideration of the cases decided by this Court dealing with the pre-emption question since its pronouncements in the *Fairlawn*, *Guss* and *San Diego* cases. Firstly, *International Asso. Machinists v. Gonzales*, 2 L. ed. (2) 1018, decided May 26, 1958, says:

> "Although the National Labor Relations Act, as amended (29 U. S. C. Sec. 141-197) carries implications of exclusive federal authority, and reflects Congress' withdrawal from the states of much that had

theretofore rested with them, the statute leaves much to the states, and statutory implications concerning what has been taken from the states and what has been left to them are to be translated into concreteness by the process of litigating elucidation."

"Nothing in the National Labor Relations Act, as amended (29 U. S. C. Sec. 141-197), deprives a state of power to award damages for loss of wages and suffering by a union member 'expelled from' membership in violation of his rights under the constitution and by-laws of the union."

"The possibility that a wrong may be partially relieved in a proceeding before the National Labor Relations Board does not deprive the wronged party of available state remedies for all damages suffered."

"The Act * * * does not displace state causes of action sounding in tort or contract when the possibility that such causes will conflict with federal policy is remote, notwithstanding that there may be an argumentative coincidence in the facts adducible in the state causes and a plausible proceedings before the National Labor Relations Board."

We shall not discuss *Garner* and *Weber v. Anheuser-Busch* as considered by the Teamsters in their brief as this Court quite concretely stated its position in both cases in the *Gonzales* opinion. Summing it all up and in accordance with its position in *International Union v. Russell*, 2 L. ed. (2) 1030, this Court has said:

"And the possibility of partial relief from the Board, does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered."

This is not a departure from the long established fundamental doctrines that have guided the Court's decisions in this field. It is an application of those fundamental doctrines to the case before it, whereas some logicians have

attempted to generalize and apply statements of this Court on the law appropriate to the case to situations, wholly unintended by the Court. This effort has made it difficult for Courts and practitioners to properly advise clients and to intelligently practice before the Courts. Certainly one can not quarrel with crystal clear statement that the jurisdiction left to the States by the Congress "are to be translated into concreteness by the process of litigating elucidation."

Secondly, we refer to *International Union v. Russell*, 2 L. ed. 2d 1030, decided May 26, 1958. Here, again, the Court finds that it is proper for a state court to award damages to one, who a union, by mass picketing and threats of violence during the course of a strike, has been prevented from engaging in his employment, although partial recovery may have been available, through the processes of the National Labor Relations Board. But there was a hiatus between federal and state compensation and since the state remedy permitted recovery for medical expense, pain, suffering and property damages as distinguished from the federal remedy providing only for reinstatement and back pay award, this Court found no difficulty in supporting the judgment obtained in the State Court with cogent reasoning. Surely, this is not a departure from fundamental principles.

The single distinguishing factor between *Gonzales*, *Russell* and the *Oliver* case now before you is that *Gonzales* and *Russell* present actions at law for money damages whereas *Oliver* presents an equity case in injunction. All other factors are similar or identical. Surely, we need not wait until the horse has been stolen, or the house has been destroyed by fire, to seek a remedy in the State to prevent conduct, which if finally consummated would result in the awarding of money damages in the State Court.

The *Weber v. Anheuser-Busch* and *American Tobacco* cases *et cetera* might be of some assistance to the Union's contention if A. C. E. or Interstate were suing the Union in the State Court to enjoin picketing. It might be of some help if A. C. E. in a suit against the Union sought to enforce the plain provisions of the Labor Management Act, by a suit in the State Court against the Union and rely on "restraint of trade" to circumvent the clear provisions of the Act by indirect enforcement.

But such is not the case here. There isn't a single allegation involving a labor dispute. There isn't a thread of evidence or a single inference to be drawn from the pleadings or the evidence that the Taft-Hartley Act or N. L. R. B. is involved. Oliver does not seek to stop the union from picketing A. C. E. Oliver says—and A. C. E. and the Union admit—that A. C. E. and the Teamsters made an agreement that uniformly *fixes* the rates all owner-operators may charge throughout the State of Ohio for their equipment, and A. C. E. threatens to end contractual relations with Oliver unless Oliver puts into effect the terms of the deal between A. C. E. and the Teamsters. This does not create an unfair labor practice or right conferred by the Federal Labor Act, but may constitute a violation of the Federal Extortion Act, a statute, which we are not here asking the Court to construe. If it were otherwise, the Courts of Ohio would have no jurisdiction to try a Teamster Union member under contract with an Interstate carrier for violation of the speed laws of Ohio. The State Courts could not try a damage suit arising out of the negligence of a Teamster belonging to the Union under contract with an interstate carrier, although it has been traditionally accepted the State and Federal Courts have concurrent jurisdiction and removal proceedings are necessary to take the case from the State to a Federal Court.

The Teamsters cite with finality the decision of this Court in *Teamsters Union vs. American Tobacco Co.*, 348 U. S. 978, and ask this Court to use it as the determining decision of the case at bar. The Supreme Court did not write any opinion in reversing the Kentucky Court, but what did it reverse? The case is reported in the State Court in 264 S. W. (2d) 250. We quote at page 251:

> "Two questions are presented for determination on this appeal and cross appeal:
>
> 1. Are the pickets around the property of the American Tobacco Company, herein referred to as 'American' at 17th and Broadway Streets in Louisville, involved in primary or secondary picketing, since the strike is conducted at the same address against American Suppliers, Incorporated, herein called 'Suppliers'?
>
> 2. May a driver of a common or contract carrier be compelled against his wishes by injunctive process to cross a picket line advertising a lawful strike, when the driver is a member of the same union that is conducting the strike, but he is not on strike himself?"

The Kentucky Court answered these two questions:

1. Primary picketing.

2. The driver must cross the picket line and deliver.

Based on those answers the Kentucky Court issued a mandate that the employees of the common carrier could not legally refuse to handle the freight for the American Tobacco Co., notwithstanding the strike against the American's subsidiary. This is the judgment which the Supreme Court reversed.

In conclusion, may we point out to the Court, the material effect the various provisions of Article 32 have

upon the lease between Oliver and A. C. E. We shall take them up in sequence.

SECTION 1. * * * "Such owner-operator shall operate *exclusively* in such service and *for no other interests.*" (Emphasis ours.)

Of course, this is not a legal or proper function for any labor organization. No union has inherent powers to bargain for the complete 24 hours of any man's day and its representation is both traditionally and legally limited to an employer for the employee's hours, wages and working conditions. It may not limit his activities beyond the hours and scope of employment.

SECTION 2. "This type of operator's compensation for wages and working conditions shall be in full accordance with all the provisions of this Agreement."

This Section is not only subject to the same evil existing in Section 1, but it completely destroys the right of carrier and Oliver to bargain for his time and equipment. For example, the Contract between Carrier and Union provides that a driver of Company equipment shall be paid for time on an hourly basis for dead heading, layover, and the like, or wholly unproductive time. An owner-operator being paid on a percentage or tonnage basis has not provided in his lease for payment of this unproductive time. By virtue of this provision, Carrier and Union have negotiated a contract, wholly out of line with Oliver's existing lease, and which on its face, appears to be in Oliver's favor, the enforcement of which does not, however, bring Oliver greater returns financially, but sounds the death knell for his lease and relationship.

SECTION 3. This Section provides that "Certificate and title to the equipment must be in the name of the actual owner."

Of course this is no more the business of the Teamsters than it is for the Rubber Workers Union to say to Goodrich, or any other rubber company, that the tire builder's home, in which he resides, shall be titled in the tire builder's name, or that the wrenches and hammers shall be bought and titled in his name. This is such a clear invasion of private rights in the interest of monopolistic control by a union that it needs no further comment.

SECTION 4. "In all cases, hired or leased equipment shall be operated by an *employee* of the certificated carrier."

Again, it is perfectly clear that here the Union attempts to completely separate equipment and driver. When it serves their purpose they say the owner-operator who drives is the carrier's employee, but here they provide that a carrier's employee must drive the equipment, and when the owner-operator places someone other than himself as driver of that piece of leased equipment, he must thereby become the carrier's employee. By the very terms of the lease, this relationship is that of independent contractor.

SECTION 5. This Section provides for a rotating board of carrier and leased equipment, and the use of all equipment, both owned and leased, before hiring any extra equipment.

This is a direct limitation on Oliver's equipment in the creating of which he had no representation, is clearly inimical to the best interests of Oliver and repugnant to his existing lease.

SECTION 6. This section provides for the method of payment of monies due Oliver, when it shall be paid, etc. According to his lease for service rendered, he is paid on the basis of a percentage of the money received by the

carrier for the freight hauled. The Teamsters may not impose upon Oliver a bookkeeping burden that is clearly not within their jurisdiction as a union or otherwise. Assuming that in order to make a living, one must join the Teamsters Union or suffer the consequences, does he thereby place in the Teamsters hands the authority to prescribe the manner of keeping his books and making his entries covering income from personal property bought, paid for, and owned by him?

SECTION 7. This section definitely attempts to fix a method of payment by carrier to Oliver, wholly inconsistent with the rights of A. C. E. and Oliver as contracting parties, and wholly foreign to bargaining regarding the wage of an employee. The Section deals with equipment, a subject which the Union says it does not seek to bargain for.

SECTION 8. This section, providing that Oliver may buy his supplies for his truck wherever he chooses and have his repair work done wherever he desires to do so, certainly is his right under his lease, and this section constitutes a further attempt to bargain for that wholly beyond the Union's right and jurisdiction.

SECTION 9. In one breath the Union denies that it is bargaining agent for the equipment, but here it places restrictions on equipment operation.

SECTION 10. This section deals with subjects almost entirely inapplicable to wages, yet it seeks to impose payments upon the carrier, which the law does not contemplate, and which the lease does not require. Again it deals with equipment and not the driver of equipment.

SECTION 11. This section provides for the dealing of advances to Oliver, by way of interest charges. Of course,

Oliver's obtaining money from a bank or from A. C. E. is no business of the Teamsters.

SECTION 12. (a) By this section A. C. E. must furnish a copy of Oliver's lease to the Joint State Committee. The Joint State Committee is neither a Federal nor State legal authority, and Oliver's business as a lessor of his equipment certainly may not be required to have his business transactions filed with any Committee having no standing as an authority to pass upon the business of an individual who otherwise is not required to furnish such data. There is neither Federal or State Statute requiring such conduct.

(b) Here the Union *fixes* a uniform rate throughout the State of Ohio for leased equipment at 9½ cents per mile for a single axle tractor, and 10 cents per mile for a tandem axle tractor, 3 cents per mile for single axle trailer, and 4 cents for the tandem with 75% of this amount for deadheading, together with certain guarantees. Oliver's lease is not on a mileage basis, but this would put all tractors on a mileage basis. Again it deals with equipment and not *wages*.

SECTION 13. This section would prevent Oliver from *picking up* and *delivering* a load of freight. Pick up and delivery is for someone else to handle at costs additional to the percentage of charge for freight hauled by Oliver.

SECTION 14. Provides that the Union shall fix the increases for which Oliver himself may bargain and deals with *equipment rental*.

SECTION 15. Provides for the cancellation of all leases including Oliver's, if the leases do not meet the terms of the Teamsters. Again, may we ask what right do the Teamsters have to dissolve or modify Oliver's lease, and

by what legal authority must Oliver submit such issue either to *arbitration* or the *Joint* State Committee, whose decision *shall be final* and *binding*, and by virtue of which Oliver is deprived of his day in Court.

SECTION 16. This section deals with a selfserving declaration of the Teamsters' intent, and is a matter in which an independent owner of equipment has no interest and which again deals with equipment as distinguished from wages.

SECTION 17. According to this, Oliver and all other owner-operators must *sell* his equipment at a price satisfactory to the Union. *If the Union raises any question,* Oliver must submit to arbitration and the Arbitration Board's decision is final. Such outrageous restriction on a man's right to sell his property subject to a Union satisfaction, and a board's decision, if the *Union raises* a question of value, has no legal standing under any circumstances.

SECTION 18. This places further restrictions on the carrier in its dealings with the owner-operator.

SECTION 19.

(a) Oliver's lease will be permitted only if the carrier agrees to submit all *grievances pertaining to Oliver* to the Grievance Committee of Employees and Union. An enumeration as to how the prohibitions shall be processed under 1, 2, 3, 4, 5 and 6 of this Section, is set forth, and uniformly enforced until January 31, 1961.

(b) Although, as it suits the purpose of the Teamsters to say it deals only with one operator owning and driving his own equipment, *here* they definitely deal with owners of *three* or *more pieces of equipment.*

One can not justify a single section thereof as a bargaining for wages. A mere reading and analysis of the wording of Article 32 justifies this Court in reaching the same conclusion reached by the original trial Court that this Article if performed,

1. Will injure Oliver.
2. Oliver is an independent contractor excluded as such from the operation of the Labor Management Relations Act.
3. Article 32 deals with Oliver's capital investment, and
4. Article 32 does constitute an unreasonable restraint of trade.

While we have dealt principally with monopoly and the destruction of competitive business and free enterprize we cannot overlook the right of the Respondent to work and earn; to earn and save; to save and invest; to invest and bargain for a return on his investment free from the interference of a Union which should confine its activities to the legitimate problems of the wages, hours and conditions of employment of employees, and permit the rate of return upon the capital investment of an independent contractor to be determined by the contracting parties.

CONCLUSION.

1. The Courts of Ohio have jurisdiction of both the parties and the subject matter.

2. Article 32 of the Over-the-Road Contract is in violation of R. C. 1331.01 et seq.

3. Article 32 is void and unenforceable by virtue of R. C. 1331.06.

4. The Judgment below should be sustained.

Respectfully submitted,

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